IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-99

EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT, KENNETH C. KENT, ELMO HOLDER, ROBERT M. LEICH, IAN F. LOCKHART, CLIFFORD K. ARDEN, JAMES A. GEYER and PAUL E. HATFIELD, on behalf of himself and all other persons similarly situated, *Petitioners,*

v.

DELTA AIRLINES, INC., EASTERN AIRLINES, ALLEGHENY AIRLINES, INC., and WILLIAM F. WOOD on behalf of himself and all other persons similarly situated, *Respondents.*

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL LEAGUE OF CITIES

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BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL LEAGUE OF CITIES

INTEREST OF AMICUS CURIAE

The National League of Cities represents, directly or through its affiliated state municipal leagues, approximately 15,000 of the 18,000 incorporated municipalities in the nation. As such, the National League of Cities is vitally interested in developments, be they local or national, which have broad ranging implications for municipal governments. The case at bar

and a related case, *Northeast Airlines, Inc.* v. *New Hampshire Aeronautics Commission,* 110 N.H. ——, 273 A.2d 676, *prob. juris. noted* Oct. 12, 1971, 40 U.S.L. Week 3161 (No. 1755, 1970 Term; renumbered No. 70-212, 1971 Term), represent such an issue of national interest because many cities own and operate airports and are facing increasing difficulty financing airports and all other municipal services. If localities are denied devices such as the passenger service charge which spread the burden of costly airport facilities necessary for commercial airline service more evenly among potential users, the National League of Cities is concerned that the end result will be a decline in the quality of the nation's airport system with direct injury to commerce and the ability of people to move from city to city.

Because of this concern the National League of Cities is filing a brief *amicus curiae* in support of Petitioners, Evansville-Vanderburgh Airport Authority District. In accordance with Rule 42(2), written consent has been received from all parties for the filing of this brief.

ARGUMENT

I. The Broadly Based Airport Financing Structure Provided by the Passenger Service Charge Is Necessary To Support and Improve Interstate Commerce and the Capacity of Citizens To Travel Freely.

Currently there are more than 2000 publicly owned airports in the nation,[1] of which more than 500 receive scheduled airline service.[2] Cities own and operate a significant number of these airports and many of these facilities operate at a deficit including the

[1] S. Rep. No. 91-565, 91st Cong. 1st Sess. 23 (1969).

[2] Air Transportation Assoc., *Air Transport 1971,* 21 (1971).

airport involved in the case at bar (R. 484 & 485). Though airports, particularly those served by the commercial airlines, are generally considered to be regional facilities serving many jurisdictions, Cf. *Airport Commission of Forsyth County, N.C.* v. *C.A.B.*, 300 F.2d 185 (4th Cir. 1962), the principal burden of supporting airports falls upon the taxpayers of the individual jurisdiction which owns the airport. Forty percent of the users of Dress Memorial Airport are non-residents of Vanderburgh County, Indiana where the airport is located (R. 485). The airport is clearly a regional facility serving large portions of Illinois and Kentucky as well as southwestern Indiana (R. 475). Though the airport is a regional facility, the record demonstrates that the full burden of that significant portion of airport costs which is not covered by airport revenues (R. 484 & 485) is covered entirely by the property tax payers within Vanderburgh County (R. 485).

In 1970 cities alone spent $435,000,000 to maintain and improve their airports.[3] While municipal expenditures increased overall by 12 percent from 1969 to 1970, city expenditures for airports increased by 21 percent and have more than doubled since 1967.[4] The burden on individual cities supporting such regional facilities as airports is increasingly difficult to bear because of the growing municipal finance crisis which in 1970 resulted in an excess of expenditures over revenues of approximately $2.6 billion[5] and forced severe curtailment of many municipal services.

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[3] U.S. Bureau of the Census, *City Government Finances in 1969-70*, 5 (1971).

[4] *Id.*

[5] *Id.*

The adverse impact of the municipal finance crisis on airport development is noted with concern in a 1971 report of the scheduled airlines' trade association:

> Financing airport development on the local level has become extremely difficult as hard-pressed cities and municipalities are faced with requirements for financing a growing number of public projects. This comes at a time when virtually all of the 23 large hub cities and many of the medium and small hub cities have a demonstrated need for new or expanded airport facilities.[6]

To achieve a more equitable sharing among all users of the burden of support for airport facilities required for commercial airline passenger service, the concept of the passenger service fee was developed and enacted into law in several states and localities. Subsequently passenger service fees with revenues dedicated to airport use were declared unconstitutional in *Northwest Airlines, Inc.* v. *Joint City-County Airport Board,* 154 Mont. 352, 463 P.2d 470 (1970) and the case at bar but upheld in *Northeast Airlines, Inc.* v. *New Hampshire Aeronautics Commission, supra,* p. 1.

Sustaining the airlines' objections to the passenger service fee will continue imposition of costs of facilities for commercial air passenger service upon a few, while many who are benefitted escape the burden. Further, if the Respondents' objections are upheld, significant injury may result to interstate commerce and the individual citizen's freedom to travel which depends upon a high quality airport system. The municipal finance crisis will make taxpayers of jurisdictions which own and operate airports particularly reluctant to pay the increased amounts necessary to support these facilities and build new ones if they cannot

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[6] *Air Transport 1971, supra,* note 2, at 20.

be assured that all beneficiaries of airports are paying a more equitable share of costs than now is the case.

II. Commercial Airline Passenger Service Imposes Significant Costs Upon Airports Amply Justifying its Special Classification for Taxation and the Imposition of the Passenger Service Charge as Reasonable Under the Equal Protection Clause.

The Supreme Court has already recognized the special nature of commercial airline service in sustaining an ad valorem property tax applied to regularly scheduled airlines but not applied to other airport users, *Braniff Airways* v. *Nebraska,* 347 U.S. 590 (1954). Commercial airline passenger service imposes special duties and costs upon local airport operators for which they are fully justified in seeking compensation.

Many major capital facilities at Dress Memorial Airport are primarily for the accommodation of the commercial airlines and their passengers. The Stipulated Facts indicate that the Terminal Building would not be essential for operation of a non-commercial airport and is required only for use of persons travelling on commercial airlines (R. 480). The instrument and approach lighting systems also would not be required except for use by the commercial airlines (R. 481). To meet the needs of commercial airlines, airport runways are thousands of feet longer than otherwise would be necessary and require far more costly construction techniques, approximating $200 per lineal foot compared to costs of $25 per lineal foot to construct runways for private, noncommercial aircraft (R. 480 & 481). Dress Memorial Airport contains 1330 acres of real estate, while only 200 to 300 acres would be required for an airport for use by private, noncommercial aircraft (R. 481).

The Airport and Airway Development Act of 1970, 84 Stat. 219, imposed new duties upon airports served

by commercial airlines. Section 51 of the 1970 Act, 84 Stat. 234, 49 U.S.C.A. 1432, requires the Administrator of the Federal Aviation Administration to establish minimum safety standards for the operation of any airports served by commercial air carriers and to issue certificates of compliance to the airports. Commercial air passenger service will be ended at airports which cannot meet the safety standards. These requirements were imposed primarily to protect commercial air passengers. It is thus most appropriate that the commercial airline passenger have a role in financing the airport which must provide required safety services or no longer be available for his convenience.

The commercial airlines are also in large part responsible for the rapid proliferation in damage claims filed against airport owners since the landmark decision of *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962) requiring airport owners to pay for damages caused by noise from aircraft overflights. "It is difficult to overestimate the impact of the *Griggs* decision. It came at a time of marked increase in property owners' complaints due to the gradual substitution by the commercial airlines of jet aircraft with their far more annoying noise characteristics for their previously all piston-driven fleets," Lesser, *The Aircraft Noise Problem: Federal Power but Local Liability*, 3 Urban Lawyer 175, 192 (1971). Under the *Griggs* doctrine awards as high as $750,000 have been reported, Urban Lawyer, *supra*, 195.

Further, the *Griggs* doctrine may be expanded to hold airport owners liable for damages resulting from any aircraft operations at or near the airport, not just damages assignable to overflights. *Ferguson* v. *City of Keene*, — N.H. —, 279 A.2d 605 (1971) allowed recov-

ery of $9500 in damages against the City of Keene, New Hampshire on the theory that a nuisance was created by noise generated in an area behind the plaintiff's house which was used as an aircraft warmup area at the airport. *Ferguson* is particularly significant for two reasons: 1. The plaintiff had received a settlement in 1957 for property taken in connection with airport expansion, but the complaint was for damages from noise of "prop-jet commercial flights" initiated at the airport in 1963 which the trial court had determined could not have been anticipated in the earlier settlement. *Id.* at 606. 2. The City of Keene, which has had these extra costs imposed by the commercial airlines' activities, is one of the parties which will gain some compensation if the passenger service fee is upheld in the related case of *Northeast Airlines, Inc.* v. *New Hampshire Aeronautics Commission, supra,* p. 1.

Passenger volume directly affects the size and number of commercial aircraft using an airport, the required size of terminal facilities and the size and volume of the vast range of other services necessary to support airline passengers. When combined with field use payments which are generally assessed according to the size and weight of aircraft and which are levied at Dress Memorial Airport (R. 486), the passenger service fee becomes a most accurate measure to apportion the cost of the publicly supported facilities for commercial air passengers.

The equal protection clause of the Fourteenth Amendment requires that "in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made,' " *Rinaldi* v. *Yeager,* 384 U.S. 305, 309 (1966), *Baxstrom* v. *Herold,* 383 U.S. 107, 111 (1966).

Under this test, the classification adopted by the Petitioners, passenger service of commercial airliners and acts relating to boarding those airliners, is easily within the requirements of the equal protection clause.

The passenger service charge also fully complies with the due process clause, for to comply with due process, "the simple but controlling question is whether the state has given anything for which it can ask return," *Wisconsin* v. *J.C. Penny Co.*, 311 U.S. 435, 444 (1940). The substantial contributions to commercial airlines and their passengers in the case at bar are obvious.

III. The Passenger Service Fee Imposes No Constitutionally Prohibited Limitations on Freedom of Travel.

Since the decision in *Hendrick* v. *Maryland*, 235 U.S. 610 (1915) it has been clearly established that a state may impose a non-discriminatory charge for use of state facilities which benefit commerce even if that charge is imposed on those who cross state lines. In *Hendrick* the charge was ostensibly imposed upon a private motor vehicle, but the charge was clearly and directly to be paid by the individual owner as a condition of his interstate travel.

In the case at bar, as in *Hendrick*, *Huse* v. *Glover*, 119 U.S. 543 (1886); *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950) and many other cases allowing charges which affected interstate travel, the motive of the state action is to maintain and support interstate and intrastate travel by providing a fair and adequate financial base supporting facilities to serve the traveller.

In cases where the right to travel across state lines has been asserted to strike down an activity, the motive of that activity has been to restrict travel generally or

by a particular class of people, *Crandall* v. *Nevada,* 6 Wall. 35 (1868) struck down a head tax imposed on all persons travelling interstate by common carrier. It is easily distinguished from the passenger service fee cases first, because it specifically applied to interstate passengers only and second, because it was in no way intended to cover or relate to any costs incurred by the state in maintaining the facilities of commerce.

Other cases affirming the right to travel voided actions designed to tax or limit the travel of specific classes of people without justification for the classification; *The Passenger Cases,* 7 How. 282 (1849) and *Henderson* v. *Mayor of New York,* 92 U.S. 259 (1876) immigrants; *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) and *Edwards* v. *California,* 314 U.S. 160 (1941) indigents; *United States* v. *Guest,* 383 U.S. 745 (1966) non-whites.

The major cases involving restrictions of foreign travel, *Kent* v. *Dulles,* 357 U.S. 116 (1958); *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964); *Zemel* v. *Rusk,* 381 U.S. 1 (1965) and *United States* v. *Laub,* 385 U.S. 475 (1967) all involved absolute bans on foreign travel by specific people or to specific places. Such absolute bans are not raised in the case at bar.

The passenger service fee is in no way intended as such a prohibited restriction on travel; and intent aside, it works no more of a restriction on travel than any other taxes and fees charged common carriers by states and localities and passed on to the passengers in the regular course of business. Such charges have already been upheld by this court in two cases applying to commercial airlines, *Braniff Airways* v. *Nebraska,* 347 U.S. 590 (1954); *Northwest Airlines, Inc.*

v. *Minnesota,* 322 U.S. 292 (1944). A recent District Court case has even upheld airport action imposing a fee expressly intended to restrict travel by general aviation, *Aircraft Owners and Pilots Ass'n* v. *Port Authority of New York,* 305 F. Supp. 93 (S.D.N.Y. 1969).

If indeed there is a constitutionally protected right to travel by air, then the passenger service fee is fully supportive of that right. It is hardly consistent with the equal protection clause of the Fourteenth Amendment to impose upon a few the full burden of subsidizing a facility protecting and supporting the air travel rights of many. The passenger service fee is designed to mitigate the heavy burden currently imposed upon the property taxpayers within Vanderburgh County and to spread the burden of the air travel facility more evenly among its beneficiaries.

IV. The Passenger Service Fee Fully Complies With the Tests for Allowable Taxation of Activities Relating to Interstate Commerce.

Regularly scheduled flights by the commercial airlines into a state or locality give sufficient situs for taxation of the airline to comply with the due process clause of the Constitution, *Braniff Airways* v. *Nebraska,* 347 U.S. 590 (1954). Further, though 88 percent of the air travel from Dress Memorial Airport is interstate in nature (R. 475) and the airlines involved in this case are interstate businesses, the activities relating to enplaning commercial airline passengers are clearly "a sufficient local incident upon which a tax may be based," *General Motors Corp.* v. *Washington,* 377 U.S. 436, 447 (1964). The substantial facilities and services required to allow the enplaning activity strongly establish its local incident.

Once sufficient connection is established between the taxing jurisdiction and the activity to be taxed, the parameters of permissible state and local taxation of activities related to interstate commerce have been generally established. "Courts have invoked the commerce clause to invalidate state taxes on interstate carriers only upon finding that: (1) the tax discriminated against interstate commerce in favor of intrastate commerce; (2) the tax was imposed on the privilege of doing an interstate business as distinguished from a tax exacting contributions for road construction and maintenance or for administration of road laws; or (3) the amount of the tax exceeded fair compensation to the state," *Capitol Greyhound Lines* v. *Brice,* 339 U.S. 542, 544 (1950).

Measured against these tests, the passenger service charge is a permissible imposition upon an activity of interstate commerce.

1. The tax in no way discriminates between interstate and intrastate commerce. It is levied without regard to the ultimate destination of the enplaning passenger.

2. The service charge is not imposed on the privilege of doing an interstate business. Under the terms of Ordinance 33, a purely intrastate carrier, if one existed, would bear the same burdens as interstate carriers. The service charge is clearly a "contribution" for special facilities necessitated by commercial air passenger service. Such charges to cover the cost of improvements have been upheld even where imposed as a condition of using previously travelled but unimproved public ways (waterways), *Huse* v. *Glover,* 119 U.S. 543 (1886), and clearly can be imposed where, as

in the case at bar, local action in constructing a facility is essential for commerce to take place.

The intent that the passenger service charge be imposed to defray costs of the facility is confirmed by Sec. 5 of Ordinance 33 which requires that proceeds of the service charge be used solely for maintenance and improvement of the airport. Imposition of such service charges is also encouraged by Federal law which states that in order to receive grant-in-aid assistance:

> the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection, 84 Stat. 229, 49 U.S.C.A. 1718(8).

3. The One Dollar ($1.00) service charge is not in excess of fair compensation for use of the facility. As already indicated, commercial air passenger service requires costly facilities not otherwise needed. Further, the record indicates that even the revenues produced by Ordinance 33 plus other available sources are not adequate to cover the costs of capital improvements in existence or planned to serve commercial air passengers (R. 488 & 489).

Though the charges in the case at bar are "reasonable and fixed according to some uniform, fair and practical standard" as required by the commerce clause, *Hendrick* v. *Maryland*, 235 U.S. 610, 623 (1915), this "reasonableness" standard will prevent assessment of unreasonably high passenger service charges,

mitigating any concern that if one dollar can be charged one thousand dollars can be charged.

Interstate commerce cannot be subjected to the burden of multiple taxation, *Michigan-Wisconsin Pipe Co.* v. *Calvert,* 347 U.S. 157, 170 (1954). However, the taxpayer must bear the burden of proof of multiple taxation, and where that burden has not been sustained, the Court has refused to pass on the multiple taxation issue, *General Motors Corp.* v. *Washington,* 377 U.S. 436, 449 (1964), *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 463 (1959). The record demonstrates no instance of multiple taxation. The reported cases on the passenger service charge display a striking similarity in adherence to a charge imposed according to enplaning passengers. In addition to the case at bar these include: *Northeast Airlines, Inc.* v. *New Hampshire Aeronautics Commission, supra,* p. 1; *Northwest Airlines, Inc.* v. *Joint City-County Board,* 154 Mont. 352, 463 P.2d 470 (1970); and *Allegheny Airlines, Inc.* v. *Sills,* 110 N.J. Super. 54, 264 A.2d 268 (1970).

The potential for multiple taxation is minimized in these instances where boarding passengers are used as the measure of the tax.

CONCLUSION

The passenger service charge at issue in the case at bar is fully consistent with the requirements of equal protection and due process of law imposed by the Constitution. It is imposed to assure that those using public facilities built primarily for their benefit contribute fairly to the costs of such facilities. In so doing, it is consistent with many other cases which have upheld

the right of states and localities to impose a charge for use of airports, highways and other transportation facilities. These charges in no way infringe upon the right to travel, indeed they support this right by maintaining an adequate financial base for facilities serving travel and commerce.

Although there may be some who assert that the goal of the passenger service charge could be better served by other devices, it is long settled doctrine that amounts of charges and methods of collection are primarily matters to be determined by the states, and as long as they are reasonable and fixed according to a uniform and fair standard they will not be held a burden to interstate commerce, *Hendrick* v. *Maryland,* 235 U.S. 610, 623 (1915). Here the charge adopted after careful consideration by the Petitioners is similar in form to a tax adopted by three state legislatures. There can be little question of the care that went into its determination.

The Petitioners have created and maintained Dress Memorial Airport as a service to commerce. Without their action it would not exist. Without a broader base of financial support for the expensive air passenger facilities, the financing crisis of local government may prevent them from providing such high quality services in the future. Considering the increasingly more costly demands for services necessary to serve commercial air passengers, it is only proper that these passengers support a greater share of the costs through the passenger service charge.

The passenger service charge should be allowed to stand. The decision of the Indiana Supreme Court de-

claring the passenger service charge unconstitutional in the case at bar should be reversed.

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